U.S. Department of Homeland Security
U.S. Citizenship and Immigration Service
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090

U.S. Citizenship and Immigration Services

(b)(6)

[redacted]

DATE: JUN 2 7 2013 Office: NEBRASKA SERVICE CENTER

[redacted]

IN RE: Petitioner: [redacted]
Beneficiary:

PETITION: Immigrant Petition for Alien Worker as a Member of the Professions Holding an Advanced Degree or an Alien of Exceptional Ability Pursuant to Section 203(b)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(2)

ON BEHALF OF PETITIONER:

[redacted]

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the AAO inappropriately applied the law in reaching its decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen with the field office or service center that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of $630. The specific requirements for filing such a motion can be found at 8 C.F.R. § 103.5. **Do not file any motion directly with the AAO.** Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires any motion to be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Elizabeth McCormack

Ron Rosenberg
Acting Chief, Administrative Appeals Office

DISCUSSION: The preference visa petition was denied by the Director, Nebraska Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a healthcare services business. It seeks to permanently employ the beneficiary in the United States as a family practice physician. As required by statute, the petition is accompanied by an ETA Form 9089, Application for Permanent Employment Certification approved by the United States Department of Labor (DOL). The director determined that the petitioner had not established that it had the continuing ability to pay the beneficiary the proffered wage beginning on the priority date of the visa petition. The director denied the petition accordingly.

The record shows that the appeal is properly filed, timely and makes a specific allegation of error in law or fact. The procedural history in this case is documented by the record and incorporated into the decision. Further elaboration of the procedural history will be made only as necessary.

As set forth in the director's April 16, 2012 decision, the primary issue in this case is whether the petitioner has established the ability to pay the proffered wage as of the priority date and continuing until the beneficiary obtains lawful permanent residence.

In pertinent part, section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2), provides immigrant classification to members of the professions holding advanced degrees or their equivalent and whose services are sought by an employer in the United States. An advanced degree is a United States academic or professional degree or a foreign equivalent degree above the baccalaureate level. 8 C.F.R. § 204.5(k)(2). The regulation further states: "A United States baccalaureate degree or a foreign equivalent degree followed by at least five years of progressive experience in the specialty shall be considered the equivalent of a master's degree. If a doctoral degree is customarily required by the specialty, the alien must have a United States doctorate or a foreign equivalent degree." *Id.*

Section 203(b)(2) of the Act also includes aliens "who because of their exceptional ability in the sciences, arts or business, will substantially benefit prospectively the national economy, cultural or educational interests, or welfare of the United States." The regulation at 8 C.F.R. § 204.5(k)(2) defines "exceptional ability" as "a degree of expertise significantly above that ordinarily encountered."

As a threshold matter, the appeal must be dismissed as moot. Crump Services, LLC, who was granted the labor certification and who filed the Form I-140 no longer intends to employ the beneficiary, in that it is no longer in business, and the record is devoid of evidence establishing that a different business entity has become a successor-in-interest to the petitioner. The AAO issued a Notice of Intent to Deny (NOID) to the petitioner dated April 30, 2013. The AAO explained that public records showed the petitioner's business status as "expired," "voluntarily dissolved," "as of 01/28/2013." The AAO requested the petitioner to provide proof that its business is currently in active status. In response to the NOID, counsel stated that the owner,

had operated under several different business names; and that was solely for the purpose of paying employees at different owned clinics. Counsel further asserted that this method of operation resulted in the petitioning business entity having limited income in relation to the other business entities. Counsel stated that as a result, was voluntarily dissolved as a separate entity and that all operations of the business, including payroll, were moved to as of January 2012. Lastly, counsel stated that has the same ownership and operations as the petitioning entity and is now held by the professional corporation only.

The petitioner submitted a letter from the practice manager of who stated that was dissolved as of January 1, 2012, that the other business entities associated with were consolidated, after which PC would then handle all business transactions, including payroll services, for the various business entities associated with The declarant further stated that the only change that took place amongst the business entities was consolidation of operations. The petitioner summited a copy of a corporate status report dated May 22, 2013 that showed that is currently in active status, that the corporation was first registered on January 16, 2002, and also submitted a copy of a Business Name Registration/DBA Application approved on May 23, 2013 requesting the business name of

Contrary to the statements made, Employer Identification Number (EIN) has failed to establish that it is a successor-in-interest to the entity that filed the petition and labor certification, On motion, counsel states that the petitioner is a payroll services company does not have income, and that it operates only as a payroll company. This brings into question the bona fides of the employment opportunity presented by the petitioner. The petitioner is a dissolved administrative services company and does not intend to employ the beneficiary in a permanent, full-time position as a doctor. The record does not establish that it has a successor-in-interest. If the employer is a different entity than the petitioner/labor certification employer, it must establish that it is a successor-in-interest to that entity. *See Matter of Dial Auto Repair Shop, Inc.*, 19 I&N Dec. 481 (Comm'r 1986).

An appellant may establish a valid successor relationship for immigration purposes if it satisfies three conditions. First, the successor must fully describe and document the transaction transferring ownership of all, or a relevant part of, the predecessor. Second, the successor must demonstrate that the job opportunity is the same as originally offered on the labor certification. Third, the successor must prove by a preponderance of the evidence that it is eligible for the immigrant visa in all respects.

The evidence in the record does not satisfy all three conditions described above because it does not fully describe and document the transaction transferring ownership of the predecessor, it does not demonstrate that the job opportunity will be the same as originally offered, and it does not demonstrate that the claimed successor is eligible for the immigrant visa in all respects, including whether it and the predecessor possessed the ability to pay the proffered wage for the relevant

periods. Therefore, as the petitioner is no longer in business and it has not been established that is a successor-in-interest the appeal will be dismissed for this additional reason. An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*, 345 F.3d 683 (9th Cir. 2003); *see also Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004) (noting that the AAO conducts appellate review on a *de novo* basis).

A second threshold issue is whether the provisions of the American Competitiveness in the Twenty-First Century Act of 2000 (AC21) provide for portability of the beneficiary to another employer. Counsel stated in response to the NOID issued by the AAO that filed an AC21 request on behalf of the beneficiary on February 28, 2012, as the beneficiary has a pending I-485 and the AC21 conversion is dependent upon the approval of the instant I-140 petition. Counsel submitted a copy of an AC21 request submitted by on February 28, 2012; two letters from the HR Coordinator of confirming the beneficiary's current employment with and confirming the company's intention to employ the beneficiary on a permanent basis.

The provisions of AC21 allow for portability 180 days after filing of the beneficiary's Form I-485. However, the operative language in section 204(j) and section 212(a)(5)(A)(iv) of the Act states that the petition or labor certification "shall remain valid" with respect to a new job if the individual changes jobs or employers. The term "valid" is not defined by the statute, nor does the congressional record provide any guidance as to its meaning. *See* S. Rep. 106-260; *see also* H.R. Rep. 106-1048. Critical to the pertinent provisions of AC21, the labor certification and petition must be "valid" to begin with if it is to "*remain* valid with respect to a new job." Section 204(j) of the Act, 8 U.S.C. § 1154(j) (emphasis added).

Statutory interpretation begins with the language of the statute itself. *Pennsylvania Department of Public Welfare v. Davenport*, 495 U.S. 552 (1990). We are expected to give the words used in the statute their ordinary meaning. *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). Furthermore, we are to construe the language in question in harmony with the thrust of related provisions and with the statute as a whole. *K Mart Corp. v. Cartier Inc.*, 486 U.S. 281, 291 (1988) (holding that construction of language which takes into account the design of the statute as a whole is preferred); *see also COIT Independence Joint Venture v. Federal Sav. and Loan Ins. Corp.*, 489 U.S. 561 (1989); *Matter of W-F-*, 21 I&N Dec. 503 (BIA 1996).

With regard to the overall design of the nation's immigration laws, section 204 of the Act provides the basic statutory framework for the granting of immigrant status. Section 204(a)(1)(F) of the Act, 8 U.S.C. § 1154(a)(1)(F), provides that "[a]ny employer desiring and intending to employ within the United States an alien entitled to classification under section . . . 203(b)(3) . . . of this title may file a petition with the Attorney General [now Secretary of Homeland Security] for such classification." (Emphasis added.)

Section 204(b) of the Act, 8 U.S.C. § 1154(b), governs USCIS's authority to approve an immigrant visa petition before immigrant status is granted:

> After an investigation of the facts in each case . . . the Attorney General [now Secretary of Homeland Security] shall, if he determines that the facts stated in the petition are true and that the alien in behalf of whom the petition is made is . . . eligible for preference under subsection (a) or (b) of section 203, approve the petition and forward one copy thereof to the Department of State. The Secretary of State shall then authorize the consular officer concerned to grant the preference status.

Statute and regulations allow adjustment only where the alien has an approved petition for immigrant classification. Section 245(a) of the Act, 8 U.S.C. § 1255(a); 8 C.F.R. § 245.1(g)(1), (2).[1]

Pursuant to the statutory framework for the granting of immigrant status, any United States employer desiring and intending to employ an alien "entitled" to immigrant classification under the Act "may file" a petition for classification. Section 204(a)(1)(F) of the Act, 8 U.S.C. § 1154(a)(1)(F). However, section 204(b) of the Act mandates that USCIS approve that petition only after investigating the facts in each case, determining that the facts stated in the petition are true and that the alien is eligible for the requested classification. Section 204(b) of the Act, 8 U.S.C. § 1154(b). Hence, Congress specifically granted USCIS the sole authority to approve an immigrant visa petition; an alien may not adjust status or be granted immigrant status by the Department of State until USCIS approves the petition.

Therefore, to be considered "valid" in harmony with the portability provisions of AC21 and with the statute as a whole, an immigrant visa petition must have been filed for an alien that is entitled to the requested classification and that petition must have been approved by USCIS pursuant to the agency's authority under the Act. *See generally* section 204 of the Act, 8 U.S.C. § 1154. A petition is not validated merely through the act of filing the petition with USCIS or through the passage of 180 days.

The portability provisions of AC21 cannot be interpreted as allowing the adjustment of status of an alien based on an unapproved visa petition when section 245(a) of the Act explicitly requires an approved petition (or eligibility for an immediately available immigrant visa) in order to grant adjustment of status. To construe section 204(j) of the Act in that manner would violate the "elementary canon of construction that a statute should be interpreted so as not to render one part inoperative." *Dept. of Revenue of Or. v. ACF Indus., Inc.*, 510 U.S. 332, 340 (1994).

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[1] We note that the Act contains at least one provision that does apply to pending petitions; in that instance, Congress specifically used the word "pending." *See* section 101(a)(15)(V) of the Act, 8 U.S.C. § 1101(a)(15)(V) (establishing a nonimmigrant visa for aliens with family-based petitions that have been pending three years or more).

USCIS will not construe section 204(j) of the Act in a manner that would allow ineligible aliens to gain immigrant status simply by filing visa petitions and adjustment applications, thereby increasing USCIS backlogs, in the hopes that the application might remain unadjudicated for 180 days.[2]

The enactment of the job flexibility provision at section 204(j) of the Act did not repeal or modify sections 204(b) and 245(a) of the Act, which require USCIS to approve an immigrant visa petition prior to granting adjustment of status. Therefore, the provisions of AC21 do not allow the beneficiary to port until and unless the underlying Form I-140 is approved.

As [redacted] has not proved that it is the successor-in-interest to the petitioner who obtained the approved labor certification, the petition is filed without a valid labor certification and must be denied. In addition, the provisions of AC21 do not allow the beneficiary to port until and unless the underlying Form I-140 is approved, which has not happened in the instant matter.

Although there is no evidence in the record to demonstrate that the petitioning business is still operational, the AAO will review the evidence submitted to determine whether the petitioner has demonstrated its continuing ability to pay the proffered wage.

The petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the priority date, which is the date the Form ETA 750 was accepted for processing by any office within the employment system of the DOL. *See* 8 C.F.R. § 204.5(d).

The regulation at 8 C.F.R. § 204.5(g)(2) states in pertinent part:

> *Ability of prospective employer to pay wage.* Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary

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[2] Moreover, every federal circuit court of appeals that has discussed the portability provision of section 204(j) of the Act has done so only in the context of deciding an immigration judge's jurisdiction to determine the continuing validity of an approved visa petition when adjudicating an alien's application for adjustment of status in removal proceedings. *Sung v. Keisler*, 2007 WL 3052778 (5th Cir. Oct. 22, 2007); *Matovski v. Gonzales*, 492 F.3d 722 (6th Cir. Jun. 15, 2007); *Perez-Vargas v. Gonzales*, 478 F.3d 191 (4th Cir. 2007). In *Sung*, the court quoted section 204(j) of the Act and explained that the provision only addresses when "an *approved* immigration petition will remain valid for the purpose of an application of adjustment of status." *Sung*, 2007 WL 3052778 at 1 (emphasis added). *Accord Matovski*, 492 F.3d at 735 (discussing portability as applied to an alien who had a "previously approved I-140 Petition for Alien Worker"); *Perez-Vargas*, 478 F.3d at 193 (stating that "[s]ection 204(j) . . . provides relief to the alien who changes jobs after his visa petition has been approved"). Hence, the requisite approval of the underlying visa petition is explicit in each of these decisions.

> obtains lawful permanent residence. Evidence of this ability shall be either in the form of copies of annual reports, federal tax returns, or audited financial statements.

Here, the ETA Form 9089 was accepted on December 10, 2008. The proffered wage as stated on the ETA Form 9089 is $129,000.00. The ETA Form 9089 states that the position requires a doctorate in medicine.

The AAO conducts appellate review on a *de novo* basis. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004). The AAO considers all pertinent evidence in the record, including new evidence properly submitted upon appeal.[3]

The evidence in the record of proceeding shows that the petitioner is structured as a Limited Liability Company (LLC). On the petition, the petitioner claims that it was established in 2000 and that it currently employs two workers. On the ETA Form 9089, signed by the beneficiary on January 24, 2011, the beneficiary does not claim to be employed by the petitioner.

The AAO notes that the petitioner is a single-member limited liability company (LLC). As such, the LLC's member's liability is limited to his or her initial investment. The business entity's net income is taken from its IRS Form 1040, Schedule C, at line 31. It is also noted that net current assets are taken from audited balance sheets, when such is provided by the petitioner.

An LLC is an entity formed under state law by filing articles of organization. An LLC may be classified for federal income tax purposes as if it were a sole proprietorship, a partnership or a corporation. If the LLC has only one owner, it will automatically be treated as a sole proprietorship by the IRS unless an election is made to be treated as a corporation. If the LLC has two or more owners, it will automatically be considered to be a partnership by the IRS unless an election is made to be treated as a corporation. If the LLC does not elect its classification, a default classification of partnership (multi-member LLC) or disregarded entity (taxed as if it were a sole proprietorship) will apply. *See* 26 C.F.R. § 301.7701-3. The election referred to is made using IRS Form 8832, Entity Classification Election. In the instant case, the petitioner, an LLC formed under Florida law, is considered to be a sole proprietorship for federal tax purposes. However, an LLC, like a corporation, is a legal entity separate and distinct from its owners, regardless of its tax treatment. The debts and obligations of the company generally are not the debts and obligations of the owners or anyone else.[4] The investor's liability is limited to his initial

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[3] The submission of additional evidence on appeal is allowed by the instructions to the Form I-290B, which are incorporated into the regulations at 8 C.F.R. § 103.2(a)(1).

[4] Although this general rule might be amenable to alteration pursuant to contract or otherwise, no evidence appears in the record to indicate that the general rule is inapplicable in the instant case. It is noted that the petitioner submitted as evidence a copy of an operating agreement signed and dated July 29, 2008. Therefore, the agreement was not in effect on March 19, 2007, which is the priority date. Regardless, even if the AAO were to consider the operating agreement as evidence, it is insufficient to demonstrate the extent to which the sole member was financially obligated to the petitioner.

investment. As the owner is only liable to his initial investment, the total income and assets of the owner and his ability, if they wished, to pay the company's debts and obligations, cannot be utilized to demonstrate the petitioner's ability to pay the proffered wage. The petitioner must show the ability to pay the proffered wage out of its own funds. The business-related income is reported on Schedule C, line 31 of the petitioner's IRS Form 1040.

The petitioner must establish that its job offer to the beneficiary is a realistic one. Because the filing of an ETA Form 9089 labor certification application establishes a priority date for any immigrant petition later based on the ETA Form 9089, the petitioner must establish that the job offer was realistic as of the priority date and that the offer remained realistic for each year thereafter, until the beneficiary obtains lawful permanent residence. The petitioner's ability to pay the proffered wage is an essential element in evaluating whether a job offer is realistic. *See Matter of Great Wall*, 16 I&N Dec. 142 (Acting Reg. Comm. 1977); *see also* 8 C.F.R. § 204.5(g)(2). In evaluating whether a job offer is realistic, United States Citizenship and Immigration Services (USCIS) requires the petitioner to demonstrate financial resources sufficient to pay the beneficiary's proffered wages, although the totality of the circumstances affecting the petitioning business will be considered if the evidence warrants such consideration. *See Matter of Sonegawa*, 12 I&N Dec. 612 (Reg. Comm. 1967).

In determining the petitioner's ability to pay the proffered wage during a given period, USCIS will first examine whether the petitioner employed and paid the beneficiary during that period. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage, the evidence will be considered *prima facie* proof of the petitioner's ability to pay the proffered wage. In the instant case, the petitioner has not established that it employed and paid the beneficiary the full proffered wage from the priority date onwards. The petitioner submitted a copy of IRS Form W-2 that it issued to the beneficiary as shown below:

- In 2009, the Form W-2 stated total wages of $20,000.00 (a deficiency of $109,000.00).

If the petitioner does not establish that it employed and paid the beneficiary an amount at least equal to the proffered wage during that period, USCIS will next examine the net income figure reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses. *River Street Donuts, LLC v. Napolitano*, 558 F.3d 111 (1st Cir. 2009), *aff'd*, No 10-1517 (6th Cir filed Nov. 10, 2011). Reliance on federal income tax returns as a basis for determining a petitioner's ability to pay the proffered wage is well established by judicial precedent. *Elatos Restaurant Corp. v. Sava*, 632 F. Supp. 1049, 1054 (S.D.N.Y. 1986) (citing *Tongatapu Woodcraft Hawaii, Ltd. v. Feldman*, 736 F.2d 1305 (9th Cir. 1984)); *see also Chi-Feng Chang v. Thornburgh*, 719 F. Supp. 532 (N.D. Texas 1989); *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. 1080 (S.D.N.Y. 1985); *Ubeda v. Palmer*, 539 F. Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983).

As evidence of its ability to pay the proffered wage, the petitioner submitted a copy of its Internal Revenue Service (IRS) Forms 1040 as a sole member's income tax return. The

proffered wage is $129,000.00. For a single-member LLC filing as a sole proprietor, the single-member's net income is reported on its member's IRS Form 1040, Schedule C at line 31. The single-member's tax returns demonstrate its net income as shown in the table below.[5]

- In 2008, the Form 1040, Schedule C at line 31 stated net income of -$8,042.00.
- In 2009, the Form 1040, Schedule C at line 31 stated net income of $22,970.00.
- In 2010, the Form 1040, Schedule C at line 31 stated net income of -$252.00.

Therefore, the petitioner has failed to demonstrate its ability to pay the proffered wage in 2008 and 2010 through net income, and has failed to establish that it had sufficient net income to pay the difference between wages actually paid to the beneficiary and the proffered wage in 2009.[6]

On appeal, counsel asserts that the director neglected to fully review the evidence submitted by the petitioner and that the petitioner has demonstrated its ability to pay the proffered wage.

Counsel states that the AAO should take into consideration the total combined income from the income and expense reports for January to September of 2010 and 2011 that was submitted as part of the petitioner's evidence. The income and expense reports show the income and expense figures for Counsel asserts that the petitioner's income, through combined income for 2011, is in excess of $850,000.00, and is sufficient to demonstrate the petitioner's ability to pay the proffered wage. Although the two business entities named above and the petitioner may be owned by the same member(s), there is no evidence in the record to establish an affiliate or parent-subsidiary relationship sufficient to demonstrate the two business entities' obligation to pay the beneficiary's proffered wage on behalf of the petitioner.

Corporations are classified as members of a controlled group if they are connected through certain stock ownership. All corporate members of a controlled group are treated as one single entity for tax purposes (i.e., only one set of graduated income tax brackets and respective tax rates applies to the group's total taxable income). Each member of the group can file its own tax return rather than the group filing one consolidated return. However, members of a controlled

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[5] The director's decision to examine the petitioner's adjusted gross income amounts and to require a list of the petitioner's recurring household expenses is incorrect and will be withdrawn. As is noted above, the petitioner is an LLC operating as a sole proprietorship; and therefore, its net income or loss is taken from Schedule C, Line 31; the personal assets of the sole member are not considered in calculating the ability to pay the proffered wage. The Schedules C in the table above are for the petitioner, Also of record are IRS Forms 1065 for 2008, 2009 and 2010 in the name of for 2008 to 2010. As these companies have not been shown to be affiliated with the petitioner, the AAO will not consider the tax returns.

[6] It is noted that the petitioner has not submitted audited balance sheets which are needed to establish its ability to pay the proffered wage through net current assets.

group often consolidate their financial statements and file a consolidated tax return. The controlled group of corporations is subject to limitations on tax benefits to ensure the benefits of the group do not amount to more than those to which one single corporation would be entitled. Taxpayers indicate they are members of a controlled corporate group by marking a box on the tax computation schedule of the income tax return. If the corporate members elect to apportion the graduated tax brackets and/or additional tax amounts unequally, all members must consent to an apportionment plan and attach a signed copy of the plan to their corporate tax returns. In the instant matter, there is no evidence to show that the three business entities filed a consolidated federal tax return. Furthermore, the income and expense reports are not audited.

USCIS (legacy INS) has long held that it may not "pierce the corporate veil" and look to the assets of the corporation's owner to satisfy the corporation's ability to pay the proffered wage. It is an elementary rule that a corporation is a separate and distinct legal entity from its owners and shareholders. *See Matter of M*, 8 I&N Dec. 24 (BIA 1958), *Matter of Aphrodite Investments, Ltd.*, 17 I&N Dec. 530 (Comm'r 1980), and *Matter of Tessel*, 17 I&N Dec. 631 (Acting Assoc. Comm'r 1980). Consequently, assets of its shareholders or of other enterprises or corporations cannot be considered in determining the petitioning corporation's ability to pay the proffered wage.

Counsel asserts that the director wrongfully determined that the amount of income received by the beneficiary from the [redacted] from September 2009 to September 2010 should not be considered in determining the petitioner's ability to pay the proffered wage. Counsel explains that the [redacted] provides physician's income for the first year in practice as incentive to practice in medically underserved areas, and that the funds are provided to the various medical clinics. Counsel submits as evidence a copy of the physician's score card issued by [redacted] to the beneficiary. The report shows that the beneficiary was paid approximately $70,333.00 from September 10, 2009 through September 9, 2010. Counsel asserts that this income should be credited to the beneficiary in establishing the petitioner's ability to pay the proffered wage. Contrary to counsel's claim, the report indicates that the funds were provided to the [redacted] not to the petitioner, for payment to the beneficiary. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm'r 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg'l Comm'r 1972)). The assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

On appeal, counsel asserts that the director failed to take into consideration that the Adjusted Gross Income (AGI) for the years 2008 through 2010 already contained wages deducted. However, the AGI of the petitioner's sole-member owner is not considered when determining whether the petitioner has the ability to pay the proffered wage. The petitioner's wage expense for the medical business is factored into the net profit or loss calculation, and the figure is found at IRS Form 1040, Schedule C, Line 31. In the instant matter, there has been no evidence presented to show that the petitioner paid wages to the beneficiary in 2008 and 2010, and the

$20,000.00 paid to the beneficiary in 2009 is deficient by $109,000.00 (the total proffered wage is $129,000.00). In general, wages already paid to other workers are not available to prove the ability to pay the wage proffered to the beneficiary at the priority date of the petition and continuing to the present.

Counsel's assertions and the evidence presented on appeal cannot be concluded to outweigh the evidence of record that demonstrates that the petitioner could not pay the proffered wage from the day the ETA Form 9089 was accepted for processing by the DOL.

USCIS may consider the overall magnitude of the petitioner's business activities in its determination of the petitioner's ability to pay the proffered wage. *See Matter of Sonegawa,* 12 I&N Dec. 612. The petitioning entity in *Sonegawa* had been in business for over 11 years and routinely earned a gross annual income of about $100,000. During the year in which the petition was filed in that case, the petitioner changed business locations and paid rent on both the old and new locations for five months. There were large moving costs and also a period of time when the petitioner was unable to do regular business. The Regional Commissioner determined that the petitioner's prospects for a resumption of successful business operations were well established. The petitioner was a fashion designer whose work had been featured in *Time* and *Look* magazines. Her clients included Miss Universe, movie actresses, and society matrons. The petitioner's clients had been included in the lists of the best-dressed California women. The petitioner lectured on fashion design at design and fashion shows throughout the United States and at colleges and universities in California. The Regional Commissioner's determination in *Sonegawa* was based in part on the petitioner's sound business reputation and outstanding reputation as a couturiere. As in *Sonegawa*, USCIS may, at its discretion, consider evidence relevant to the petitioner's financial ability that falls outside of a petitioner's net income and net current assets. USCIS may consider such factors as the number of years the petitioner has been doing business, the established historical growth of the petitioner's business, the overall number of employees, the occurrence of any uncharacteristic business expenditures or losses, the petitioner's reputation within its industry, whether the beneficiary is replacing a former employee or an outsourced service, or any other evidence that USCIS deems relevant to the petitioner's ability to pay the proffered wage.

In assessing the totality of the circumstances in this case, it is concluded that the petitioner has not established that it had the continuing ability to pay the proffered wage. There are no facts paralleling those in *Sonegawa* that are present in the instant matter to a degree sufficient to establish that the petitioner had the ability to pay the proffered wage. Nor has the petitioner demonstrated the occurrence of any uncharacteristic business expenditures or losses during the relevant years. The petitioner has not submitted evidence to establish that the beneficiary is replacing a former employee whose primary duties were described in the ETA Form 9089. Overall, the record is not persuasive in establishing that the job offer was realistic in the relevant years.

Beyond the decision of the director, as admitted by the petitioner, it is a payroll services company and not a healthcare services business as indicated on the ETA Form 9089 and the

Form I-140. A labor certification for a specific job offer is valid only for the particular job opportunity, the alien for whom the certification was granted, and for the area of intended employment stated on the labor certification. 20 C.F.R. § 656.30(c)(2). Although a Form ETA 9089 approved by the DOL accompanied the petition, the evidence in the record and the admission by the petitioner calls into question whether the job offer was realistic. The petitioner is not in compliance with the terms of the labor certification and has not established that the proposed employment will be in accordance with its terms. *Matter of Izdebska*, 12 I&N Dec. 54 (Reg. Comm. 1966). As such, the petition is not accompanied by a valid labor certification, and the petition must be denied for this additional reason. 8 C.F.R. § 204.5(k)(4).

For these reasons, considered both in sum and as separate grounds for denial, the petition may not be approved. The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not met that burden.

ORDER: The appeal is dismissed.